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NO. 91-813

Supreme Court, U.S.
FILED
DEC 18 1991
OFFICE OF THE CLERK

In The Supreme Court of the United States

October Term, 1991

ARTHUR J. FARMER,
PETITIONER

VERSUS

RAY MABUS,
GOVERNOR OF THE STATE OF MISSISSIPPI,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. DOES THIS COURT LACK JURISDICTION OVER THIS MATTER BECAUSE: (A) ON JANUARY 14, 1992, THIS MATTER WILL BE MOOT, OR (B) THE PETITIONER DOES NOT HAVE STANDING?

2. UNDER THE SPECIFIC FACTS OF THIS CASE, WAS THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT CORRECT IN CONCLUDING THAT DISCIPLENARY ORDERS GIVEN BY THE GOVERNOR OF MISSISSIPPI, AS COMMANDER-IN-CHIEF OF THE MISSISSIPPI MILITIA, TO HIS SUBORDINATE, THE ADJUTANT GENERAL, WERE NON-JUSTICIABLE?

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No. 91-813

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ARTHUR J. FARMER,

PETITIONER,

versus

RAY MABUS,
GOVERNOR OF THE STATE OF MISSISSIPPI,

RESPONDENT

The respondent Ray Mabus, Governor of the State of Mississippi, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's decision in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Farmer v. Mabus*, 940 F.2d 921 (5th Cir. 1991).

STATEMENT OF THE CASE

When the respondent, Governor Ray Mabus, appointed the petitioner to the position of Adjutant General in 1988, he assured the petitioner that he would be allowed to command the Mississippi National Guard in accordance with the law. There is absolutely no proof in this case that respondent, for political reasons, directed petitioner to make appointments to fill officer slots in the Mississippi National Guard. The Fifth Circuit recognized "[t]he keen effort by the general's able counsel to recast this dispute as an internecine political struggle in

Mississippi, rather than a military personnel matter," and rejected that characterization of this dispute. Pet. 65A.[1]

In January of 1990, Governor Ray Mabus learned from a news article that the petitioner, Adjutant General Arthur J. Farmer, had purchased real property adjacent to Camp Shelby, Mississippi, at a time when possible expansion of Camp Shelby was under consideration. Pet. 2A. On January 24, 1990, respondent Mabus issued a written reprimand to General Farmer concerning his purchase of property adjacent to Camp Shelby and formally asked petitioner "to immediately divest" himself of any interest in the property. Pet. 2B. The Governor additionally informed the Adjutant General that he had requested the Mississippi Ethics Commission to thoroughly investigate this matter. Pet. 2B.

On February 9, 1990, respondent Mabus informed, directed, and ordered Adjutant General Arthur J. Farmer as follows:

(1) That as Commander-in-Chief of the Military Department of the State of Mississippi, respondent Mabus was assuming direct control over the day-to-day operations of the Department;

(2) Respondent Mabus appointed Brigadier General Brackeen to assume an added duty as the Governor's Special Advisor for Military Affairs wherein General Brackeen would be responsible for advising the Governor with respect to all aspects of the functioning of the Military Department of the State of Mississippi. Pet. 3A.

(3) Adjutant General Arthur J. Farmer was directed:

> (a) to coordinate all aspects of his current duties as Adjutant General through respondent Mabus' office, including but not limited to those responsibilities set out in § 33-3-11, Miss. Code of 1972;

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[1] Pet. ____ refers to the Petitioners' Petition for Writ of Certiorari and the appropriate page.

> (b) to submit a report to the Governor's Office each Thursday afternoon setting out the Adjutant General's proposed activities for the following week;
>
> (c) not to undertake any proposed activities until approved in writing by the Governor; and,
>
> (d) to submit a report each Monday morning to the Office of the Governor, accounting for the Adjutant General's activities for the previous week. Pet. 3A, 4A.

This order in no manner deprived the Adjutant General of any of his authority or responsibilities, nor in any way materially diminished his authority or responsibilities. The February 9, 1990 order clearly contemplated that the Adjutant General would continue with his responsibilities:

> "... including but not limited to those responsibilities of the Adjutant General set out in Section 33-3-11, Mississippi Code of 1972." Pet. 3A.

On February 12, 1990, Lieutenant General John B. Conaway, the Chief of the National Guard Bureau, an auxiliary of the Department of Army and Air Force that is directed to oversee complaince with federal National Guard requirements, issued a memorandum concerning the Mississippi National Guard wherein he stated, *inter alia*:

> Enclosed is a letter from Governor Ray Mabus of Mississippi indicating that he intends to assume direct operational control over the Military Department of the State of Mississippi, and that his advisor and representative in that regard will be Brigadier General Denver Brackeen. This has been accomplished.
>
> Governor Mabus has asked that the National Guard Bureau work directly with his office on National Guard matters. *This action is within the authority of the Governor, as Commander-in-Chief of the Mississippi National Guard*. (emphasis added) Pet. 4D.

The Adjutant General refused to recognize the superior civilian authority of the Governor and on April 18, 1990, attempted to reassert his authority to command the day-to-day activities of the Mississippi National Guard. Pet. 5A, 6A. In the absence of the Governor, the Lieutenant Governor directed the Adjutant General to conform his conduct to the prior orders of the Governor, which the Adjutant General reluctantly did. Pet. 5A, 6A. The Adjutant General continued to reject the notion of civilian control and initiated this action in district court.

Predicated upon the foregoing, the Governor became convinced that the Adjutant General would never submit to civilian control. This insubordination coupled with the perceived various violations of the Mississippi Code of Military Justice compelled the Governor to initiate court martial proceedings against the Adjutant General. On June 15, 1990, the Governor suspended the Adjutant General, with pay, until the final resolution of the court martial proceedings. Pet. 8A, 9A. The court martial proceeding was resolved in favor of the petitioner; his suspension was lifted; and, he presently functions in his position subject to the February 9, 1990 orders of the Governor.

ARGUMENT

I. THE APPEAL WILL BE MOOT ON JANUARY 14, 1992, BECAUSE PETITIONER'S POSITION CEASES WITH THE EXPIRATION OF GOVERNOR MABUS' TERM OF OFFICE

Respondents' term of office as Governor of the State of Mississippi ceases on January 14, 1992.[2] Pursuant to Article 6, Section 219 of the Mississippi Constitution, "[t]he Adjutant General['s] . . . appointment shall expire with the governor's term of office." Pet. 6. This issue will be moot on January 14, 1992, *i.e.*, petitioner will no longer be Adjutant General and respondent will no longer be governor.

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[2] In the November 1991 general election, Governor Ray Mabus, seeking a second term as a Democrat, was defeated by Kirk Fordice, a Republican.

This dispute is not "capable of repetition, yet evading review." In *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), this Court elaborated on this doctrine, and held that a case was not moot when: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation and expiration, and (2) there was a reasonable expectation that the same complaining party would be subject to the same action again." In this regard, on December 11, 1991, Governor-elect Fordice publicly announced that he would appoint Jim Garner of Biloxi, Mississippi as Adjutant General of the Mississippi National Guard. Clearly, petitioner will not be reappointed to the position of Adjutant General, and there is no reasonable expectation that the petitioner will ever be again subject to the same action he now challenges. Simply stated, this issue is moot. *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); *Golden v. Zwickler*, 394 U.S. 103, 107 (1969).

The record in the action indicates that petitioner at all times has received the maximum and full statutory salary for the position of Adjutant General, however, petitioner now asserts that the Governor has not "issued his statutorily required recommendation that General Farmer be promoted to Major General." Pet. 12. This is a non-issue because when the petitioner was confirmed by the Mississippi Senate, state law automatically commissioned petitioner as a Major General in the Mississippi National Guard. Section 33-3-7, Miss. Code Ann. provides, in part:

> "The governor shall nominate and, by and with the consent of the senate, appoint and commission an Adjutant General, which appointment shall carry with it the rank of Major General."

Petitioner evidently is incorrectly complaining that he has not been promoted to a Major General in the United States National Guard. Pet. 9. There is absolutely no requirement that a state Adjutant General have a federal commission. In order to have a federal rank of Major General in the United States National Guard, a guardsman must be federally recognized. Federal recognition means acknowledgement by the federal government that a person appointed by the state to the National Guard meets the prescribed federal standards for their particular rank. The Adjutant Generals of various states, unlike any

other member or officer of the National Guard, are not required to have federal recognition. Accordingly, there is no state or federal statutory requirement that petitioner have a federally recognized rank of Major General. The uniqueness of state Adjutant Generals will be fully discussed in the next section of this brief.

Further, petitioner has not requested the Board for Correction of Military Records, 10 U.S.C. 1552, to review this supposed promotion issue. This board was especially created by Congress to resolve disputes of this nature, and as this Court recognized in *Chappell v. Wallace*, 462 U.S. 296, 303 (1983), petitioner must avail himself of this administrative process before seeking federal judicial review. *Also see*, *Ballenger v. March*, 708 F.2d 349, 350-51 (8th Cir. 1983).

This appeal is moot and because the Fifth Circuit directed the district court to vacate its judgment and dismiss petitioner's complaint, Pet. 65A, this Court should simply deny the Petition for Certiorari. *United States v. Munsingwear Corp.*, 340 U.S. 36 (1950).

II. THE PETITIONER DOES NOT HAVE STANDING TO CHALLENGE THE GOVERNOR'S ACTIONS CONCERNING FEDERAL LAW

The basic rules that have developed regarding standing are: (1) the plaintiff must clearly allege and demonstrate that he personally has suffered or will suffer some distinct and individualized injury-in-fact as a result of defendant's putatively illegal conduct; (2) the injury can be traced with some degree of causal certainty to the challenged conduct of defendant; (3) the personal injury is likely to be redressed by the requested relief; (4) the plaintiff must assert his own legal rights and interests and not those of third parties; (5) the injury must consist of more than a generalized grievance that is persuasively shared by many; and (6) the plaintiff's complaint must fall within the zone of interests to be regulated or protected by the provision in question. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471-477 (1982). With these elements in mind, a review of the structure of the National Guard and the role of a state Adjutant General demonstrate that

the petitioner has no standing to challenge the Governor's action concerning federal law or federal regulations as they relate to the Mississippi National Guard or as they relate to the Adjutant General.

The National Guard of the United States, as we know it today, was established by Congress in 1933 as a reserve component of the U.S. Army and U.S. Air Force. 48 Stat. 155. The National Guard of the United States consists of the federally recognized members of the National Guard of the various states. Id. The 1933 Act created a dual enlistment system whereby "an incoming guardsman joined both the National Guard of his home state and the National Guard of the United States." *Johnson v. Powell*, 414 F.2d 1060, 1063 (5th Cir. 1969).

The state entities known as "National Guard" are defined by 32 U.S.C. § 101(4) as follows:

> National Guard means that part of the organized militia of the several states . . ., active and inactive that --
>
> (a) is a land force;
>
> (b) is trained, and has its officers appointed, under the Sixteenth Clause of Section 8, Article I, of the Constitution;
>
> (c) is organized, armed, and equipped wholly or partly at Federal expense; and
>
> (d) is *federally recognized*. (emphasis supplied)

"Federal Recognition" means acknowledgement by the federal government that persons appointed by the state to the Guard meet the prescribed federal standards for their particular service grade. Members of the Mississippi National Guard, as a consequence of federal recognition, concurrently hold membership in a distinct federal military organization, the National Guard of the United States. 10 U.S.C. § 3351(a).

While there exists a dual enlistment system, there does not exist a *dual service system*. A member of the National Guard can only wear one hat at a time, *i.e.* -- he either is serving the state as a member of the Mississippi National Guard or he is serving

the nation as a member of the United States National Guard. A member of the National Guard cannot simultaneously serve the state and the national government.

This Court in *Perpich v. Department of Defense*, ___ U.S. ___, 110 S.Ct. 2418, 110 L.Ed.2d 312 (1990) clearly articulated this "one hat" at a time concept:

> Since 1933 all persons who have enlisted in a state National Guard unit have simultaneously enlisted in the National Guard of the United States. In the latter capacity they become a part of the Enlisted Reserve Corps of the Army, but unless and until ordered to active duty in the Army, they retained their status as members of a separate state guard unit.
>
> * * *
>
> In a sense, all of them now must keep three hats in their closets--a civilian hat, a state militia hat, and an army hat--only one of which is worn at any particular time. When the state militia hat is being worn, the 'drilling and other exercises' . . . are performed pursuant to 'the authority of training the Militia according to the disciplines prescribed by Congress', but when the hat is replaced by the federal hat, the militia clause is no longer applicable.

In this regard, if a member of the Mississippi National Guard is federalized or called to active duty, such member is relieved of his Mississippi National Guard duties until he is released from his national active duty status.[3]

Congress has also required that there shall be an Adjutant General in each state and that such Adjutant General "*shall perform the duties prescribed by the laws of that jurisdiction.*" 32 U.S.C. § 314(a). In this instance, Congress, clearly deferred to the states the ability to determine what specific duties would be required of a state Adjutant General, as well as how those duties could be effectuated.

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[3] This statement is made explicitly clear by 32 U.S.C. § 325(a) and 32 U.S.C. § 102(12). Petitioner was not called to active duty during the period in question.

To further illustrate the congressional intent that a state Adjutant General shall perform "the duties prescribed by the laws of" a state, federal law prohibits the federal government from taking any punitive action against a state Adjutant General.

The Adjutant General in his present status as a member of the Mississippi National Guard cannot be court martialed under the United States Uniform Code of Military Justice, and can only be discharged "as provided by the laws of the State" of Mississippi. *See* 42 U.S.C. § 324(b). In the event that the Adjutant General would violate any federal statute or federal rule or regulation concerning the operation of the Mississippi National Guard, the only action the federal government could take would be to bar, wholly or in part, the Mississippi National Guard from receiving federal funds and benefits. *See* 32 U.S.C. § 108.

Further, indicating congressional deference to the various states, the Adjutant General, unlike any other member or officer of the National Guard, *is not required to have federal recognition*. *See*: 10 U.S.C. § 3363. Also, National Guard Regulation 600-100 paragraph 11-3 provides:

> "Federal Recognition Criteria for
> Chief of State Military Departments.
>
> a. State Adjutant General.
>
> (1) A state Adjutant General may be appointed and serve in that capacity without federal recognition."

The "dual enlistment system" under which guard members and officers enlist and serve in both a state and federal guard is not mandatory on the various state Adjutant Generals, and, equally as clear, Congress has deferred to the various states the prerogative of determining the duties of a state Adjutant General.

As this Court has reiterated, standing is perhaps the most important of the jurisdictional doctrines. *Allen v. Wright*, 468 U.S. 737, 750-751, (1984). Federal courts are confined to

the adjudication of actual "cases" and "controversies" within the meaning of Article III of the Constitution, and those doctrines set forth "fundamental limits on federal judicial power in our system of government." *Allen*, 468 U.S. at 750. The requirements of standing--premised upon the "properly limited . . . role of the courts in a democratic society"--is thus a threshold determination, and it may not be glossed over. *Id., quoting Warth v. Seldin*, 422 U.S. 490, 498, 45 L.Ed.2d 343 (1975).

Moreover, where the relief sought is injunctive in nature, rather than simply damages for past conduct, to have standing the petitioner further must clearly allege and demonstrate, *inter alia*, that he *personally* faces a realistic, immediate, and non-speculative threat that he will be subjected to, and harmed by, the particular policy of which he complains. *City of Los Angeles v. Lyons*, 461 U.S. 95, 75 L.Ed.2d 675 (1983). In this action, the petitioner has totally failed to prove such a threat or injury.

The Adjutant General has no standing to challenge the Governor's action concerning federal law or regulations as they relate to the Mississippi National Guard or as they relate to the Adjutant General.

III. THE FIFTH CIRCUIT'S DECISION OF NON-JUSTICIABILITY WHEN APPLIED TO PETITIONER, DOES NOT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

This case challenges a military personnel action, i.e., the orders of the Governor, as commander-in-chief, to his Adjutant General. The Fifth Circuit relied largely on its prior decision of *Crawford v. Texas Army National Guard*, 794 F.2d 1034 (5th Cir. 1986) and correctly concluded that this action was not "justiciable in a federal forum." Pet 65A.

This Court in *Orloff v. Willoughby*, 345 U.S. 84, 93-94 (1953) stated:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justifica-

> tion, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service."

In *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) this Court stated:

> "The special relationships that define military life have 'supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that Courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."

The *Chappell* court determined that military personnel may not bring a *Bivens* type[4] damage suits for constitutional violations against their superior officer. The *Chappell* court followed the doctrine announced in *Feres v. United States*, 340 U.S. 135 (1950) which doctrine precludes claims under the Federal Tort Claims Act for injuries which "arise out of or are in the course of activity incident to service." Id. at 146.

This Court in *United States v. Shearer*, 473 U.S. 52 (1985) reaffirmed the effectiveness of the *Feres* court:

> "To permit this type of suit [negligence] would mean that commanding officers would have to stand pre-

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[4] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

> pared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to replace restraints on a soldier's off-base conduct." *Id.* at 58.

Finally, in *United States v. Stanley*, 483 U.S. 669 (1987), this Court observed that the various circuits had not been uniform in their interpretation of *Chappell*. *Id.* at 676. This Court reaffirmed *Feres*, *supra*, concluding that the "incident to service" test established in *Feres* was to be applied to *all Bivens*' claims in a military setting. *Id.* at 680.

Chappell and *Stanley* were suits against federal defendants, thus involved a *Bivens*' claim, while this civil action is brought against the Governor, as Commander-in-Chief of the Mississippi National Guard, under 42 U.S.C. 1983.

The Fifth Circuit in *Crawford v. Texas Army National Guard*, 794 F.2d 1034 (5th Cir. 1986), affirmed the district court's dismissal of claims brought by members of the Texas National Guard against the Guard, the Governor, and twelve military personnel for violation of their constitutional rights. The *Crawford* plaintiffs asserted that they were dismissed or removed from active duty in retaliation for reporting criminal activity and racial discrimination. The *Crawford* court found no significant difference between the claims in that action and those held impermissible in *Chappell*. The Fifth Circuit found that the First, Fifth, and Fourteenth *(due process)* Amendments and § 1983 causes of action advanced in *Crawford* required "judicial second-guessing of military actions" and interfered with the military system to the same extent as the *Bivens*' claims rejected in *Chappell*.

The *Crawford* court stated:

> "The principle expressed in these cases *[Chappell* and *Shearer]* is that civilian courts may not set in plenary review over intraservice military disputes. Following *Chappell* and *Shearer*, there can be little doubt that *the permissible range of lawsuits by present or former servicemen against their superior officers is, at the very least,*

> *narrowly circumscribed*." *Id.* at 1035 (emphasis supplied).
>
> * * *
>
> [W]e perceive no basis upon which to distinguish such claims [§1983] from those held impermissible by *Chappell*. *Id.* at 1036.

Further, *Crawford* declined to except plaintiff's claims for injunctive relief from the principles announced by *Chappell*, finding that such an exception:

> "could swallow *Chappell's* rule of deference. We therefore believe that suits for injunctive relief, like those for money damages, must be carefully regulated in order to prevent intrusion of the courts into the military structure." 794 F.2d at 1036-37.

In footnote 1 on page 13 of his petition, petitioner lists cases which he asserts are contrary to the "non-justiciability decision" rendered by the Fifth Circuit. Petitioner's assertion is incorrect. All of these cases except *Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975) were specifically considered by the Fifth Circuit in *Crawford*, and that court correctly concluded:

> The Common characteristic of these decisions is that they involve challenges to the facial validity of military regulations and were not tied to discrete personnel matters. The nature of the lawsuits, rather than the relief sought, rendered them justiciable. . . . We therefore believe that suits for injunctive relief, like those for monetary damages, must be careful regulated in order to prevent intrusion of the courts into the military structure. 794 F.2d at 1036-37.

Committee for G. I. Rights v. Callaway, *supra*, also involved challenges to the facial validity of military regulations, *i.e.*, a drug abuse prevention plan, and were not tied to "discrete personnel matters." Petitioner also incorrectly asserts that the Fifth Circuit's "non-justiciability decision" is "counter to this Court's recent opinion in *Perpich v. Depart-*

ment of Defense, ___ U.S. ___, 110 L.Ed 2d 312 (1990). Pet. 13. *Perpich* did not involve a discrete personnel matter, but concerned itself with litigation initiated by the Governor of Minnesota challenging the constitutionality of a federal statute.

The Eighth Circuit in *Watson v. Arkansas National Guard*, 886 F.2d 1004 (8th Cir. 1989) and *Lovell v. Heng*, 890 F.2d 36 (1989), concurred with the *Crawford* court finding that a National Guard member was precluded from seeking injunctive relief concerning a military personnel decision. It should be noted that prior to the *Watson* and *Lovell* decisions, the Eighth Circuit decided *Shaw v. Gavatney*, 795 F.2d 1351 (8th Cir. 1986), wherein the Court held that Shaw's dismissal as United States property and fiscal officer for the State of Arkansas was subject to judicial review, pursuant to the factors set out in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). In *Watson*, the Eighth Circuit addressed its prior *Shaw* decision and stated:

> "The Army, however, only challenged the district court's conclusion that the balancing of the *Mindes* factors weighed heavily in favor of judicial review. Id. Our Court was asked only to review the district court's weighing of the *Mindes* factors; we did not discuss the *Feres* or *Chappell* decisions, and the case was pre-*Stanley*. *Shaw* therefore is of little assistance here. The present case is the first case in which we have reached and decided the question whether there is an injunctive-relief exception to *Chappell*." 886 F.2d at 1011.

In this action, the nature of the lawsuit clearly challenges a military personnel action, *i.e.* the orders of the Governor, as Commander-in-Chief, to the Adjutant General. Clearly, the challenge to the validity of the Governor's actions is *TIED* to a military personnel decision.

The respondent submits that there is nothing in this record that supports or suggests that the Governor's actions were "political", Pet. 65A, or that those actions generated from any thing but (1) the illegitimate land transaction, and (2) the insubordination of the Adjutant General.

The decision of the Fifth Circuit is correct and is not at cross-purpose with the decisions of this Court or other circuits. The issues presented are not substantial and are definitely not of national concern.

IV. THE ADJUTANT GENERAL IS SUBORDINATE TO THE GOVERNOR IN MATTERS AFFECTING THE MILITARY DEPARTMENT AND MILITIA OF THE STATE OF MISSISSIPPI

This Court *Parker v. Levy*, 417 U.S. 733, (1974) recognized that the military is subject to direct civilian control of the Commander-in-Chief:

> "As we observed...the military 'is the *executive arm' whose 'law is that of obedience.*' While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community. *The military establishment is subject to the control of the civilian commander in chief and the civilian departmental heads under him, and its function is to carry out the policies made by those civilian superiors.*" (emphasis supplied)

The orders given by the Governor to the Adjutant General were authorized by state law and were in conformity with the teachings in *Parker v. Levy, supra*. In that regard, Article 3, Section 9 of the Mississippi Constitution provides:

> "The military shall be in strict subordination to the civil power."

Additionally, Article 9, Section 217 of the Mississippi Constitution provides that:

> "[T]he governor shall be the commander-in-chief of the military..."

Further, § 33-3-3 Miss. Code Ann. provides:

> There shall be in the executive branch of state government a military department. The Adjutant General shall be the executive head of the department and, as such, subordinate . . . *to the governor in matters pertaining thereto.*

Further, § 33-3-1 Miss. Code Ann. provides in part:

> The Governor shall be the Commander-in-Chief of the militia . . . except when it is called into the service of the United States.

Finally, § 33-3-7, Miss. Code Ann. provides in part:

> "The Adjutant General shall be chief of staff to the governor, *subordinate only to the governor in matters affecting the military department and militia of this state.*"

The state statutes concerning the duties of the Adjutant General and their dimensions contemplate that the Adjutant General is merely the executive head of the Mississippi National Guard and in all matters pertaining thereto is subordinate to the Governor.

Petitioner's lack of a property right in the position of Adjutant General further demonstrates that the Adjutant General is completely subordinate to the Governor. In that regard, Article 9, Section 219, Mississippi Constitution provides:

> The adjutant-general, and other staff officers to the commander-in-chief, shall be appointed by the governor, and their appointment shall expire with the governor's term of office, and the legislature shall provide by law a salary for the adjutant-general commensurate with the duties of said office.

Further, Section 33-3-3, Mississippi Code Ann. (1972) provides, in part:

> There shall be in the executive branch of the state government a military department. *The Adjutant General shall be the executive head of the department* and, as

> such, subordinate only to the governor in matters pertaining thereto.

Finally, Section 33-3-7, Mississippi Code Ann. (1972) provides, in part:

> The governor shall nominate and, by and with the consent of the senate, appoint and commission an Adjutant General . . .

The above provisions do not, expressly or implicitly, create any property interest in the position of Adjutant General because they do not contain a substantive "only for cause" limitation on removal of an individual from the position of Adjutant General. *Board of Regents v. Roth*, 408 U.S. 564 (1922); *Bishop v. Wood*, 426 U.S. 341 (1976).

Notwithstanding the above constitutional and statutory provisions, the Mississippi Legislature in 1984 created a Statewide Personnel System which gave "state service" employees a property right in their position and denied "non-state service employees a property right in their positions. The petitioner is explicitly excluded from any property interest under this scheme.

Section 25-9-127, Miss. Code Ann. (Supp. 1990) provides, in part:

> No employee of any department . . . who is included under this chapter . . . may be dismissed or otherwise adversely affected as to compensation or employment status except for inefficiency or other good cause . . .

Section 25-9-107, Miss. Code Ann. (Supp. 1990) defines the state employees contemplated by § 25-9-127, supra, and provides, in part:

> (b) "State service" shall mean all employees of state departments, agencies and institutions as defined herein, except those officers and employees excluded by this chapter.
>
> (c) "Nonstate service" shall mean the following officers and employees excluded from

> the state service by this chapter. The following are excluded from the state service:
>
> * * *
>
> (viii) Officers and enlisted members of the National Guard of the state;
>
> * * *
>
> (xv) The administrative head who is in charge of any state department, agency, institution, board or commission, wherein the statute specifically authorizes the Governor, board, commission or other authority to appoint said administrative head . . .

Clearly as recognized by Lieutenant General John B. Conaway, Chief of the National Guard Bureau, an auxiliary of the Department of Army and Air Force that is directed to oversee compliance with federal national guard requirements, the orders given by the Governor to petitioner were "within the authority of the Governor, as Commander-in-Chief of the Mississippi National Guard." Pet. 4D.

V. CONCLUSION

For the reasons set forth above, respondent respectfully submits that this Court should deny the petition for Certiorari.

This, the 18th day of December, 1991.

Respectfully submitted,

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